

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

<b>STATE OF OKLAHOMA,</b>	)	
	)	
<b>Plaintiff,</b>	)	
	)	
<b>v.</b>	)	<b>Case No. 05-cv-329-GKF(PJC)</b>
	)	
<b>TYSON FOODS, INC., et al.,</b>	)	
	)	
<b>Defendants.</b>	)	

**STATE’S REPLY TO DEFENDANTS’ RESPONSE (DKT. #2491) TO  
STATE’S MOTION *IN LIMINE* PERTAINING TO EVIDENCE OR  
ARGUMENT SUGGESTING THE POLLUTION AT ISSUE  
SHOULD BE REMEDIED BY SOME OTHER ENTITY (DKT. #2434)**

The State of Oklahoma respectfully submits this Reply in Support of Its Motion *in Limine* Precluding Evidence or Argument Suggesting the Pollution at Issue Should Be Remedied By Some Other Entity [Dkt. #2434].

**Introduction**

The test of relevance is whether the proffered evidence will make a fact of consequence more likely (or probable) than it would be without the evidence. Fed. R. Evid. 401. Evidence that does not meet this test is not relevant and should be excluded. Fed. R. Evid. 402. Even if the evidence is relevant or marginally relevant, it may be excluded because of its unfair prejudice or its likelihood of confusion of the issues or misleading the jury. Fed. R. Evid. 403.

In the present case, the evidence that other entities could or should have taken action to abate the pollution caused by poultry waste in the IRW is not relevant to the issue of whether Defendants’ conduct should be enjoined. Even if the Court were to determine the marginal relevance of the “other entities” evidence, it should be excluded based on the likelihood that it will confuse the issues and mislead the jury.

The issues raised by Defendants in their Response [Dkt. #2491] are addressed below.

**I. The Court Should Reject Defendants' Attempt To Resurrect Its Primary Jurisdiction Argument.**

Defendants' opposition to the State's Motion *in Limine* is an attempt to proffer evidence on primary jurisdiction, an issue that was decided by this Court on July 5, 2007. *See* Dkt. #1186-87. In their Response, Defendants make two arguments that are equally unavailing. First, Defendants suggest that the Court's decision to deny Defendants' Motion to Stay based on primary jurisdiction [Dkt. #133] was not a legal finding, but was simply an exercise of the court's discretionary power not to apply the primary jurisdiction doctrine. Response at 3. Second, Defendants suggest that an issue that has been disposed of in a previous ruling can still be relevant. Both arguments should be rejected by the Court.

The issue of primary jurisdiction was fully briefed and argued on July 5, 2007. *See* Dkt. #1216. The Court ruled in the State's favor on the issue. 7/5/07 Transcript, 101:5-19. Had the Court done otherwise, it would have declined to proceed with this case, and referred the case to an administrative agency that exercises primary jurisdiction. The very fact the case is going to trial in this Court indicates primary jurisdiction has no applicability. Moreover, Defendants fail to explain how the absence of specific findings by the Court means that the primary jurisdiction issue is still viable and that evidence on it should be allowed. They certainly do not cite any substantive or procedural authority for the argument. Defendants' argument is without foundation.

Similarly, Defendants' recitation on the difference between an issue that is "dispositive" and one that is "relevant" does nothing to advance their argument. An issue that could not survive a dispositive motion is certainly not relevant, particularly in the context of primary jurisdiction. Particularly in the context of a doctrine that would have diverted the case from

Court to an administrative agency, the dispositive motion effectively “disposed of” the issue.

Because primary jurisdiction was disposed of early in the case, it is not now relevant to the legal issues to be determined by the Court or the jury. To argue otherwise is improper.

## **II. Defendants’ Evidence Does Not Further the Issue of Applicability or Appropriateness of Injunctive Relief.**

Defendants suggest on page 4 of their Response that if the Court excludes evidence of “other entities,” it will be denying Defendants’ ability to present evidence that injunctive relief is not applicable or not appropriate in the present case. However, Defendants do not suggest what other entity could stop the harm caused by their improper waste disposal practices. None can. Instead, Defendants plan on putting forward a confusing array of suggestions that administrative agencies could correct the problems they cause. The Court should not allow such testimony or argument that is irrelevant, confusing and prejudicial.

Injunctive relief is an appropriate remedy if the party seeking the injunction can show the elements supporting its issuance. This is so even if the adverse party is subject to regulation by an agency or board. *Sharp v. 251<sup>st</sup> Street Landfill, Inc.*, 1991 OK 41, 810 P.2d 1270. If the State carries its burden on the elements of injunctive relief, it is entitled to an injunction, and it is not relevant that another entity could or should have taken action. It does not further the inquiry, and therefore, it is not helpful to the trier of fact. Perhaps more disturbing is the likelihood that the evidence would confuse the issues, mislead the jury, and result in a decision reached on an improper basis, which Fed. R. Evid. 403 was designed to prevent.

## **III. Defendants’ Statements That the State Has “Declined To Exercise Its Power To Abate Any Imminent Environmental or Health Threat” Are Inaccurate.**

The record in this case is replete with testimony and documentary evidence of ongoing efforts by the State to resolve pollution problems caused by the excessive amount of poultry

waste in the sensitive IRW. Furthermore, the State, through the Secretary of the Environment, has brought this action to stop Defendants' continuous pollution of the watershed. It cannot be fairly and accurately said that the State has declined to exercise its power in this matter. Such suggestions are not only irrelevant and inaccurate, but are misleading, unfairly prejudicial, and should be excluded under Fed. R. Evid. 401, 402, and 403.

The fact that other governmental entities may have the power to take action with regard to pollution in the IRW does not mean that such testimony or argument is relevant. The argument makes no fact of consequence more or less probable than it would be without such evidence, which is the test under Fed. R. Evid. 401 and 402. Whether anyone else did or did not take action is not relevant to the issues in the case. Arguing such is clearly an attempt to misdirect the jury's attention away from Defendants' polluting conduct. Pointing a finger at the State legislature or any other governmental entity is not a defense to Defendants' responsibility for excessive amounts of phosphorus and bacteria in the waters of the IRW.

**IV. Should the Jury Decide To Enjoin Defendants' Conduct, Such Action Will Not Hamper the Efforts of "Other Entities" To Resolve Environmental Issues in the IRW.**

Defendants argue that a decision by the jury to enjoin Defendants' conduct will impede or impair ongoing regulatory activities in the IRW. Response at 4. Further, Defendants argue that "regulatory injunctions" are generally discouraged. *Id.* The Court should reject this argument. Regulatory schemes and judicial determinations have long been side-by-side companions in American jurisprudence. For example, a person who has been injured by a defective product is not required to seek redress through the Consumer Product Safety Commission. Nor is the injured party required to ask the legislature to outlaw the product by enacting a bill to prohibit the product's sale or use. The injured party can seek redress directly

from the courts. In the present case, Defendants have not pointed to any law, rule, or regulation that requires the State to seek relief in any other forum prior to, or in place of, litigation in the courts.

Further, the argument that the scope of injunctive relief will hamper existing efforts to regulate poultry waste in the IRW is highly speculative and misleading, and Defendants cite no factual support for this claim. Moreover, any injunctive relief will be directed toward the conduct of the poultry integrator Defendants. Existing regulations will continue to be in effect.

**V. The State Has Met Fed. R. Evid. 403's Requirements.**

Finally, Defendants incorrectly argue that the State cannot sustain the burden of showing unfair prejudice under Fed. R. Evid. 403, which is required to prevent the admission of otherwise relevant evidence. First, the State has shown that the issue is not relevant under Fed. R. Evid. 401 and 402 because it does not further the inquiry. Second, the State has shown not only that the evidence is unfairly prejudicial, but that it will confuse the issues, mislead the jury, and waste time. Specifically, unfair prejudice will result when the jury is led to believe that there is (or was) a requirement of the State to seek redress from another entity aside from the courts when no such requirement exists. Further, any presentation of evidence on an issue that has already been eliminated after a full hearing wastes time and resources.

**Conclusion**

For the foregoing reasons, the State asks the Court to grant its motion *in limine* prohibiting evidence or argument that the pollution of the IRW should be remedied by some other entity as a basis for denying the injunctive relief sought by the State.

Respectfully Submitted,

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